JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN IMMIGRATION PROCEEDINGS.

THE power of a government to deal with aliens necessarily involves a power to determine whether a given person is an alien. So it may happen that one in fact a citizen may be denied the rights which his citizenship confers and subjected to treatment lawfully appropriate only for aliens.

This possibility is suggested by the recent case of In the Matter of Hermine Crawford.[1] It is there held that the power given by Congress to the Commissioner of Immigration, subject to review by the Secretary of Commerce and Labor, to exclude aliens "afflicted with a loathsome or with a dangerous contagious disease," applies to aliens domiciled in the United States returning after a temporary sojourn abroad. This threatens every returning citizen with administrative proceedings in which he must establish the fact not only of his domicile but of his citizenship.

It is therefore important to know how this determination is to be reached. Of the Crawford case it has been said: "Under the rule laid down in the Chinese Exclusion Acts a citizen of the United States may be declared by a board of immigration officers to be a non-resident alien afflicted with a dangerous disease and on appeal for a judicial determination of his citizenship the best he can expect is to have his case considered by a higher executive officer whose decision, if adverse to his claim, results in his deportation from the country."[2]

The authority for this conclusion is United States *v.* Ju Toy.[3] That case held in effect that a citizen of Chinese parentage seeking admission at the frontier could be excluded by the administrative authorities, though denied a hearing before a judicial body on the question whether he was in fact a citizen. Though the act of Congress purports to give no authority to exclude citizens, the court holds that it gives power to determine finally whether or not a given person is a citizen. As the court construes the statute, the jurisdiction of the administration, for all practical

[1] 40 N. Y. L. J. 419 (Dist. Ct., N. Y., Oct. 28, 1908).
[2] 22 HARV. L. REV. 221.
[3] 198 U. S. 253.

purposes, is not conditioned upon citizenship, but is broad enough to deal with all persons of Chinese birth seeking to enter the country.

The question of race was not disputed in the case before the court, so the decision does not tell us whether judicial review could be withheld when the petitioner alleges he is not a Chinaman. From one point of view the distinction is of no importance, because a citizen of Chinese parentage is entitled to the same rights as citizens of any other ancestry. But the court, in determining whether it is due process to vest such power in the administration, weighs considerations of public welfare in the balance against the danger of possible infringement of private rights. In balancing these opposing considerations, the number of citizens whose rights may possibly be invaded is of importance. That number is greatly limited when the administration is dealing only with members of races clearly distinguishable from those which furnish the preponderating majority of our citizens. So it is possible to urge that the principle of the Ju Toy case would not apply where the administration is given power to deal with all aliens of whatever race; for the exercise of this power would imperil the rights of every citizen in the land who chanced to be returning from abroad. And the possible infringement of private rights to be balanced against the public welfare is increased numerically a thousandfold.

But even supposing the principle of the Ju Toy case should be applied to the exclusion of all aliens affected with certain diseases, it may well be doubted that the decisions of the Supreme Court warrant the assertion that on appeal from the decision of the immigration officers for a judicial determination of citizenship the most that can be expected is a consideration of the question by the higher executive officer.

The Ju Toy case came before the Supreme Court upon a certificate from the court below presenting the question whether the court shall treat the finding of fact by the executive officer as final and conclusive "unless it be made affirmatively to appear that such officers in the case submitted to them, abused the discretion vested in them, or in some other way, in hearing and determining the same, committed prejudicial errors." So the case involves no question of judicial control over administrative procedure. To say that if the administration uses proper methods in ascertaining a fact, the decision of the Secretary is not reviewable by the courts, is

one thing. To give to the Secretary the final power to pass upon the sufficiency of the procedure, is quite another.

This latter question came before the court in Chin Yow *v.* United States.[1] A Chinese person detained for deportation petitioned for a writ of *habeas corpus*. The District Court dismissed the petition on the ground that it was without jurisdiction in the matter. Appeal was taken to the Supreme Court. Among the allegations of the petition was one that the petitioner was prevented by the officials of the Commissioner from obtaining the testimony of certain named witnesses and that had such opportunity been granted, he could have produced overwhelming evidence that he was born in the United States and therefore a citizen.

The court construes these allegations to mean that the petitioner was arbitrarily denied such a hearing and such an opportunity to prove his right to enter as the statute meant him to have. The constitutionality of the procedure provided by the statute was not involved. The question was whether, when the court finds this statutory procedure is not observed by the administration in reaching its decision, judicial relief can be given, even after the finding of the Commissioner has been approved by the Secretary of Commerce and Labor — a decision which the statute declares shall be final. If the statute intended the decision of the Secretary to be final with respect not only to the fact decided but also to the legality of the methods employed in reaching the determination, the question of constitutionality would be raised. But the court is of opinion that the statutory provision that the decision of the department shall be final presupposes that the decision was reached after a hearing in good faith. Though the mode provided by the statute is exclusive, the courts are not forbidden to interfere where the statutory methods are disregarded. In other words, the statute does not vest in the administration power to determine whether its conduct of the case conforms to the law.

It is therefore held to be clear that this question is one for the courts. The opinion, however, is careful to state that the only ground for taking jurisdiction is the denial of a fair opportunity to be heard. The court may grant the writ to look into the question, but if it find the hearing fair, it can proceed no further and the petitioner must be remanded.

The Supreme Court lays down no rule as to what faults or omis-

[1] 208 U. S. 8.

sions will render a hearing unfair. It declares, however, that the unfairness and therefore the jurisdiction of the court would not be established merely by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true even though no contrary or impeaching testimony was adduced. Nor could a denial of a satisfactory hearing be established by proving that the decision was wrong. For this would secure that judicial review expressly denied to Ju Toy.

The Supreme Court in the Chin Yow case reversed the decision of the District Court and ordered the writ of *habeas corpus* to issue. What decree should the District Court make in case it finds a fair hearing was denied? Such denial by no means involves the conclusion that the petitioner is entitled to enter. He is not therefore entitled to his discharge. The logical disposition of the case would remand him to the Commissioner for a re-hearing, with directions to the Commissioner how to proceed. Mr. Justice Holmes considers such contingency and concludes: "The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

It would therefore seem that if the District judge holds the hearing before the Commissioner unfair, he may take matters into his own hands and consider the evidence on the merits. If it seems to him to establish the fact of citizenship, he may discharge the petitioner, free from the power of the Secretary of Commerce and Labor to make any decision in the matter, final or otherwise. But this is a fact on which the statute meant the court to have no say. That statute has been sustained as constitutional.

So the Supreme Court seems to be limiting its decision in the Ju Toy case to this extent: if the court finds the administration acted fairly, its decision will not be questioned; if unfairly, the court will assume jurisdiction of the whole case and determine finally whether the petitioner is a citizen and entitled to enter.

The District judge is thus afforded opportunity for indulging in some intricate mental processes. The evidence produced to show the hearing was unfair may convince him the decision of the Commissioner was erroneous. But he is not to think about this until he first decides that the hearing was unfair. And he is not to deem the hearing unfair because the decision is erroneous, nor merely because the "Commissioner did not accept certain sworn state-

ments as true, even though no contrary or impeaching evidence was adduced." From this it would seem the hearing might not be unfair when all the evidence in the case tended to prove citizenship, but the Commissioner chose to disbelieve it. The crucial fact in determining whether the hearing was unfair must doubtless be the denial of opportunity to present evidence. But it is hardly possible for a judge, who is convinced that one in fact a citizen is to be denied admittance, to eliminate this and other considerations from his mind in judging the fairness of the hearing. So that the petitioner who questions the administrative procedure is not so entirely dependent upon the judgment of the administration on the merits of the case as the Ju Toy decision would lead us to suppose.

To reconcile the dictum in the Chin Yow case with the Ju Toy decision, we must state the law as follows. If the District Court order the discharge of the petitioner solely because it deems the decision of the administration erroneous, the Supreme Court will on appeal reverse its action. But if the District Court discharge the petitioner because it first finds that the administration denied him a fair hearing and then that its decision was erroneous, this decree the Supreme Court will not disturb.

But the question may come before the Supreme Court in such a way that it will be compelled to choose between the Ju Toy decision and the suggestion in the Chin Yow case. The District judge may not follow the hint of the Supreme Court. He may find the hearing unfair, refuse to examine the case on its merits, and order the Commissioner to proceed anew. If appeal from this decree is taken to the Supreme Court, shall that court sustain the decree or order the District Court to examine the case on its merits? Or suppose the decree of the District Court is not appealed from. After the rehearing before the Commissioner, the writ of *habeas corpus* is again sought from the District Court. The District Court issues the writ, decides that the rehearing was fair and refuses to examine the case on its merits. We then have the precise state of facts in which the court says the petitioner must be remanded. When the question of the legality of the procedure is entirely eliminated, the Supreme Court cannot force the District Court to examine the case on its merits without overruling squarely its decision in the Ju Toy case. Unless we are to assume that such is the intention of the Supreme Court, we must regard the suggestion that the most convenient thing to be done when the hearing is adjudged unfair is to try the case on its merits as a

piece of advice to the District Court which it may follow or not as it pleases. But it seems unusual for the Supreme Court to leave so important a question to the whim of an inferior tribunal.

The question seems never to have been squarely raised whether the procedure provided by statute, if duly followed, is due process. One of the grounds of Mr. Justice Brewer's dissent in the Ju Toy case was that the administrative action was inconsistent with the requirements of due process because of the severity of its procedure. But the court decides the case on the assumption that no abuse of authority of any kind is involved. But in the Sing Tuck case [1] where the court held that at any rate the immigrant could not get before the courts until after he had pursued the remedies offered him by the statute the opinion in referring to the procedure stated that in case of appeal from the inspector to the Secretary, new evidence, briefs, etc., could be submitted, and that the whole scheme was intended to give as fair a chance to enter the country as the necessarily summary character of the proceedings would admit.

From this review of the decisions, we may attempt to state the judicial relief open to one who claims to be a citizen and who is prevented by administrative authorities from entering the country on the ground that he is an alien within the prohibited classes. Where he has no fault to find with the methods pursued by the administration in reaching its determination that he is not in fact a citizen, he cannot question that determination before the courts. If he can establish to the satisfaction of the court that the procedure employed by the administration was not according to law, he is at least entitled to a rehearing before the administrative authority. Probably, the court which decides that the administrative hearing was unfair may if it chooses dispose of the case on its merits. Possibly, after an administrative hearing has been adjudged unfair, the petitioner may compel the court to hear and determine the whole case. It may be that the Supreme Court means to lay down the rule that if the administration does not play fair the first time, the whole case will be taken out of its hands. But the power of the administration is not thus expressly limited by the terms of the statute. It is difficult to see how the court can enforce compliance with such a rule, consistently with its earlier decisions.

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[1] United States *v.* Sing Tuck, 194 U. S. 161.

Finally, it is to be remembered that if the question of alienage depends upon a matter of law, the question is always one for the court, and judicial relief will be granted even before recourse is had to the administrative remedies offered.[1]

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[1] Gonzales *v.* Williams, 192 U. S. 1.